A.F.R.

90

HIGH COURT OF JUDICATURE CHHATTISGARH : BILASPUR

(Division Bench)

CORAM : HON'BLE SHRI S.R. NAYAK, C.J. &
HON'BLE SHRI D.R. DESHMUKH, J

WRIT PETITION NO.661 OF 2002

ORDER FOR CONSIDERATION

Sd/-

CHIEF JUSTICE
17/02/2006

HON'BLE SHRI D.R. DESHMUKH, J I Agree

Sd/-
Dilip Raosaheb Deshmukh
Judge

POST IT FOR PRONOUNCEMENT
OF ORDER ON: **21/02/2006**

Sd/-
Chief Justice
19/02/2006

A.F.R.

HIGH COURT OF JUDICATURE CHHATTISGARH : BILASPUR

(Division Bench)

CORAM : HON'BLE SHRI S.R. NAYAK, C.J. &
HON'BLE SHRI D.R. DESHMUKH, J

WRIT PETITION NO.661 OF 2002

PETITIONER M/s. V.T.P. Constructions
Prop. Shri Krishana Mudliar
Station Road Rajnandgaon (C.G.)

Versus

RESPONDENTS

1. State of Chhattisgarh through secretary Department of Commercial tax. D.K. Mantralaya Bhavan Raipur (C.G.)
2. Commissioner of Commercial tax. Raipur (C.G.)
3. Deputy Commissioner of Commercial Tax. Durg (C.G.)
4. Commercial Tax Officer. Rajnandgaon (C.G.)

Present : Mr. Neelabh Dubey, learned counsel for the petitioner.
Mr. Utkarsha Verma, learned Dy. G.A., for the State.

O R D E R

(Passed on 21st February, 2006)

The following order of the Court was passed by

S.R. NAYAK, CJ:

In this writ petition, the Constitutional validity of Section 35 of the Chhattisgarh Vanijyik Kar Adhiniyam, 1994 (for short 'the Adhiniyam') is questioned.

(2) The petitioner is a proprietary concern of one Shri Krishana Mudliar and it has been executing works contracts for various Departments of the Chhattisgarh State Government and others and it is holding commercial tax registration No.061/RDN/14/2739/02. During the

year 2001-2002, the petitioner had executed works contracts awarded by Executive Engineer, P.W.D. (B&R), Division Khairagarh, for which it received payment of Rs.1,27,115/- on which sales tax of Rs.2,545/-, being 2% of sum of Rs.1,27,115/- was deducted at source towards the sales tax payable by the petitioner as provided under Section 35 of the Adhiniyam. The petitioner has produced copy of certificate of tax deduction dated 11/04/2001 at source made under Section 35 of the Adhiniyam and the same is marked as Annexure-P/1.

(3) In support of the writ petition, it is contended that Section 35 of the Adhiniyam does not make any provision for deduction and ascertainment of value and nature of goods supplied during execution of works contracts. It is also contended that Section 35 of the Adhiniyam does not make any provision for determination of value of goods supplied in the course of inter-State trade during execution of works contracts.

(4) The writ petition is opposed by the respondents by filing reply/statement of objections. In the reply statement, it is stated that the contractors who are engaged in the construction of buildings, roads, bridges, dams etc generally come from other States. The process of assessment of sales tax is very lengthy and before the assessment is completed, such contractors disappear from the scene after receiving full payment under contracts. In such situation, it was very difficult for the Commercial Tax Department to trace-out such contractors and eventually sales tax payable by such contractors could not be recovered at all thereby causing heavy financial loss to the Government. In order to safeguard the interest of the State, Section 35 is enacted in the Adhiniyam and that the State Legislature has legislative competence to enact Section

35. It is stated that Section 35 is not a unique provision in the Adhiniyam and similar provisions are enacted in the Sales Tax Acts of other States, for example, Section 6-D of the Uttar Pradesh Trade Tax Act, Section 6-E of the Bengal Finance (Sales-Tax) Act, 1941; Section 25-A of the Bihar Finance Act, 1981; Section 25-B of the Haryana General Sales Tax Act, Section 12-A of the Himachal Pradesh General Sales Tax Act, Section 16-C of the Jammu & Kashmir General Sales Tax Act, Section 19-A of the Karnataka Sales Tax Act and Section 13-AA of the Orissa Sales Tax Act, 1947. It is also contended that the Constitutional validity of Section 35 of the Adhiniyam was already considered and upheld by the Division Bench of the Madhya Pradesh High Court in the case of **Punj Lloyd Ltd. Vs. State of Madhya Pradesh and others**[1].

(5) We have heard Shri Neelabh Dubey, learned counsel for the petitioner and Shri Utkarsha Verma, learned Dy. Govt. Advocate for the State of Chhattisgarh. Shri Neelabh Dubey would contend that the Legislature of the undivided State of Madhya Pradesh had no legislative competence to enact Section 35 of the Adhiniyam; that the impugned provision violates mandate of Article 286-1(a)(b) of the Constitution of India. In support of his submission, Shri Neelabh Dubey would place reliance on the judgments of the Supreme Court in **Steel Authority of India Ltd. Vs. State of Orissa and others**[2], **Bhawani Cotton Mills Ltd. Vs. The State of Punjab and another**[3], **Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and others**[4] and the judgment of the Division Bench of the Karnataka High Court in **Larsen & Toubro Ltd. Vs.**

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1. (1996) 29 VKN 533
2. (2000) 118 STC 297 (SC)
3. (1967) 20 STC 290 (SC)
4. (2000) 118 STC 306 (SC)

State of Karnataka and others[5]. Shri Utkarsha Verma, learned Dy. Govt. Advocate, for the State of Chhattisgarh, *per contra*, while maintaining that Section 35 of the Adhiniyam is *intra vires* would heavily depend upon the judgment of the Madhya Pradesh High Court in **Punj Lloyd Ltd. Vs. State of Madhya Pradesh and others**[1] (supra) and contend that since the constitutional validity of the very same provision was questioned before the High Court of Madhya Pradesh and since it was upheld, this Court is bound by that judgment and reviewing the Constitutional validity of the same provision again by this Court would not arise. In reply, Shri Neelabh Dubey would submit that the above judgment of the High Court of Madhya Pradesh, in the first place, did not consider at all the legislative competence of the Legislature of the undivided State of Madhya Pradesh to enact Section 35 and it further overlooked the dictum of the judgment of the Supreme Court in **Bhawani Cotton Mills Ltd. Vs. The State of Punjab and another**[3] (supra). Shri Neelabh Dubey would contend that in view of the judgments of the Supreme Court referred to above, the judgment of the High Court of Madhya Pradesh in **Punj Lloyd Ltd. Vs. State of Madhya Pradesh and others**[1] (supra) being *per incuriam* is not a good law.

(6) By virtue of entry 54 of List II of the Seventh Schedule read with Article 246 of the Constitution of India, the States are empowered to levy taxes on the sale or purchase of goods, other than newspapers. The Forty-Sixth Amendment to the Constitution, *inter alia*, Clause (29A)(b) in Article 366 of the Constitution, as a result, tax on the purchase or sale of goods included a tax "on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works

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5. (2003) 129 STC 401

contract". Article 286(1) of the Constitution states that no law of a State shall impose, or authorize the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place outside the State or in the course of the import of goods into, or export of goods out of the territory of India. Article 286(2) authorizes Parliament by law to formulate principles for determining when a sale or purchase of goods takes place in any of the ways mentioned in sub-Article (1) of Article 286. Acting upon this power, Parliament has set out in Sections 3, 4 and 5 of the Central Sales Tax Act, 1956, principles for determining when a sale or purchase of goods can be said to take place in the course of inter-State trade or commerce, when a sale or purchase of goods can be said to take place outside the State and when a sale or purchase of goods can be said to take place in the course of import or export.

(7) In the background of the above legislative history, let us proceed to analyse Section 35 of the Adhiniyam. By reason of sub-Section (1) thereof, the person letting-out a works contract and responsible for paying any sum to any contractor for carrying out any works contract which involves the sale of any goods in the course of execution is obliged to deduct before making payment of any amount towards the value of such contract 2% of such sum towards the tax payable by the contractor under the Adhiniyam, provided the value of the works contract exceeds rupees one lakh. Sub-Section (1) of Section 35 of the Adhiniyam directs that the amount so deducted shall be adjusted towards the tax assessed on such contractor under Section 27 and any amount that remains after such adjustment shall be refundable to the contractor. Section 27 of the Adhiniyam provides for assessment of tax payable to the State Government under the Adhiniyam. Thus, it is quite

clear that the deduction to be made under sub-Section (1) of Section 35 of the Adhiniyam is towards the sales tax that is payable to the State upon works contract and it is 2% of the value of the works contract. Sub-Section (2) of Section 35 requires the person letting out a works contract to grant to the contractor a certificate in respect of such deduction and to deposit such amount into the Government Treasury in such manner and within such time as may be prescribed. Sub-Section (3) provides that any person making a payment of the amount into the Government Treasury as provided under sub-Section (2) should be deemed to have made the payment thereof on the authority and on behalf of the contractor and the treasury receipt for such payment shall constitute a good and sufficient discharge of the liability of the person to the contractor towards the value of the contract to the extent of the amount specified in the receipt. By reason of sub-Section (4), such deposit is required to be adjusted by the Sales-Tax Officer towards the sales-tax liability of the contractor and it constitutes good and sufficient discharge of the liability of the person letting out a works contract to the contractor to the extent of the amount deposited. Sub-Section (5) of Section 35 of the Adhiniyam provides that where a person letting out a works contract contravenes the provisions of sub-Section (1) or sub-Section (2) of Section 35 is liable to penalty of an amount which shall be 25% of the amount required to be deducted under sub-Section (1). The person letting out a works contract, therefore, should he contravene sub-Section (1) of Section 35, would be liable to a penalty of an amount which shall be 25% of the amount required to be deducted under sub-Section (1).

(8) The person letting out a works contract of value exceeding one lakh rupees to a contractor involving sale of goods in the course of

execution thereof, as required by sub-Section (1) of Section 35 of the Adhiniyam, is to deposit towards contractor's liability to State sales tax at the rate of 2% of such amount as he pays to the contractor, regardless of the fact that the value of the works contract includes the value of inter-State sales, outside sales or sales in the course of import. The Supreme Court in **Gannon Dunkerley and Co. Vs. State of Rajasthan**[6] in para 8 of the judgment, has held that it is necessary to exclude from the value of a works contract the value of goods which are not taxable by a State in view of Sections 3, 4 and 5 of the Central Sales Tax Act, 1956. That dictum mandates that the value of goods involved in the execution of a works contract has to be determined after making these exclusions from the value of the works contract.

(9) In **Bhawani Cotton Mills Ltd. Vs. The State of Punjab and another**[3] (supra), the Supreme Court held thus:

> "----------If a person is not liable for payment of tax at all, at any time, the collection of a tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid; because, if particular sales or purchases are exempt from taxation altogether, they can never be taken into account, at any stage, for the purpose of calculating or arriving at the taxable turnover and for levying tax."

In the same case, it was further held as under:

> "If there is a liability to tax, imposed under the terms of the taxing statute, then follow the provisions in regard to the assessment of such liability. If there is no liability to tax there cannot be any assessment either. Sales or purchases in respect of which there is no liability to tax imposed by the

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6. (1993) 88 STC 204 (SC)

statute cannot at all be included in the calculation of turnover for the purpose of assessment and the exact sum which the dealer is liable to pay must be ascertained without any reference whatever to the same".

Thus, there can be no doubt, upon a plain interpretation of Section 35 of the Adhiniyam, that section is enacted for the purposes of deduction at source of the State sales tax that is payable by a contractor on the value of a works contract. For the purposes of the deduction, the person letting out a works contract is entitled to take into account the fact that the works contract involves transfer of property in goods consequent upon of an inter-State sale, an outside sale or a sale in the course of import. In other words, the person letting out a works contract is required by sub-Section (1) of Section 35 of the Adhiniyam to deposit towards the contractor's liability to State sales tax of 2% of such amount as he pays to the contractor, regardless of the fact that the value of the works contract includes the value of inter-State sales, outside sales or sales in the course of import. Thus, it is quite clear that the State Legislature in enacting Section 35 in the Adhiniyam acted beyond the power granted to it under Article 246 of the Constitution read with List I entry 92-A and List II entry 54 of Seventh Schedule.

(10) The provisions of section 13-AA (as replaced in 1993) of the Orissa Sales Tax Act, 1947 and that of Section 12-A of the Himachal Pradesh General Sales Tax Act, 1968 which are substantially similar to the provisions of section 35 of the Adhiniyam are struck down by the Supreme Court as unconstitutional on the ground that those provisions were beyond the purview of the State Legislatures in the case of **Steel Authority of India Ltd. Vs. State of Orissa and others**[2] (supra) and

Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and others[4] (supra).

(11) The Supreme Court in the case of **Steel Authority of India Ltd. Vs. State of Orissa and others**[2] (supra) had dealt with a similar situation though not identical. The matter related to the Constitutional validity of Section 13-AA of the Orissa Sales Tax Act, 1947 (as replaced in 1993). Section 13-AA as it originally stood was struck down by the High Court of Orissa in **Brajendra Mishra Vs. State of Orissa**[7]. The Orissa High Court struck down the original Section 13-AA since it did not provide any mechanism to exclude a transaction from its purview even if, ultimately, the transaction was not at all liable to the levy of sales tax. The above decision of the High Court of Orissa was accepted by the State and Section 13-AA was replaced on October 4, 1993 with certain modifications. The re-enacted Section 13-AA read as follows:

> "13AA. *Deduction of tax at source from the payment to works contractors.-* (1) Notwithstanding anything contained in section 13 or any other law or contract to the contrary, any person responsible for paying any sum to any contractor (hereinafter referred to in this section as the 'deducting authority') for carrying out any works contract, which involves transfer of property in goods, in pursuance of a contract between the contractor and –
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> (a) Central Government or any State Government, or
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> (b) any local authority, or
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> (c) any authority or corporation established by or under a statute, or

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7. (1994) 92 STC 17(Orissa)

(d) any company incorporated under the Companies Act, 1956 (1 of 1956) including any State or Central Government undertaking, or

(e) any co-operative society or any other association registered under the Societies Registration act, 1860 (21 of 1860).

shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheques or draft nor any other mode, whichever is earlier, deduct an amount towards sales tax equal to four per cent of such sum in respect of the works contract, if the value of the works contract exceeds rupees one lakh.

(2) While making deduction as referred to in sub-section (1), the deducting authority shall grant a certificate to the contractor in the form prescribed and shall send a copy thereof to the Sales Tax Officer within whose jurisdiction the works contract is executed.

(3) The amount deducted from the bills or invoices shall be deposited into the Government treasury within one week from the date of deduction in such form or challan as may be prescribed.

(4) Such deposit into the Government treasury shall be adjusted by the Sales Tax Officer towards the sales tax liability of the contractor and would also constitute a good and sufficient discharge of the liability of the deducting authority to the contractor to the extent of the amount deposited.

(5)(a) Where, on an application being made by the contractor in this behalf, the Commissioner is satisfied that any works contract of the nature referred to in sub-section (1) involves both transfer of property in goods and labour or service, or involves only labour of service and, accordingly, justifies deduction of tax on a part of the sum in respect of

the works contract or, as the case may be, justifies no deduction of tax, he shall, after giving the contractor a reasonable opportunity of being heard, grant him such certificate as may be appropriate, in the manner prescribed :

Provided that nothing in the said certificate shall affect the assessment of the sales tax liability of the contractor under this Act.

(b) Where such a certificate is produced by a contractor before the deducting authority, until such certificate is cancelled by the Commissioner, the deducting authority shall either make no deduction of tax or make the deduction of tax as the case may be, in accordance with the said certificate.

(6) If any person contravenes the provisions of sub-section (1) or (2) or (3) or of clause (b) of sub-section (5), the Sales Tax Officer shall, after giving him an opportunity of being heard, by an order in writing impose on such person penalty not exceeding twice the amount required to be deducted and deposited by him into Government treasury."

The Constitutional validity of the re-enacted section 13AA was challenged before the Supreme Court. The Supreme Court placing reliance on its earlier judgment in the case of **Bhawani Cotton Mills Ltd. Vs. The State of Punjab and another**[3] (supra) while striking down Section 13AA of the Orissa Sales Tax Act, 1947 (as replaced in 1993) being beyond the purview of the Orissa State Legislature was pleased to observe thus:

"There can be no doubt, upon a plain interpretation of section 13-AA, that it is enacted for the purposes of deduction at source of the State sales tax that is payable by a contractor on the value of a works contract. For the purpose of the deduction neither the owner nor the

> Commissioner who issues to the contractor a certificate under section 13-AA(5) is entitled to take into account the fact that the works contract involves transfer of property in goods consequent upon of an inter-State sale, an outside sale or a sale in the course of import. The owner is required by section 13-AA(1) to deposit towards the contractor's liability to State sales tax four per cent of such amount as he credits or pays to the contractor regardless of the fact that the value of the works contacts includes the value of inter-State sales, outside sales or sales in the course of import. There is, in our view, therefore, no doubt that the provisions of Section 13-AA are beyond the powers of the State Legislature for the State Legislature may make no law levying sales tax on inter-State sales, outside sales or sales in the course of import".

(12) In the case of **Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and others**[4] (supra), the Supreme Court following the judgment in the case of **Steel Authority of India Ltd. Vs. State of Orissa and others**[2] (supra) struck down Section 12-A of the Himachal Pradesh General Sales Tax Act, 1968. Section 12-A of the said Act provided for deduction of an amount from the bills or invoices of the works contractors purporting to be tax payable towards transfer of goods involved in works contract. The Himachal Pradesh High Court had taken the view that the relevant amount is the valuable consideration payable for the transfer of property in goods and not the entire value or consideration for the entire works contract and what was directed to be deducted is only an amount not exceeding 4% as may be prescribed purporting to be a part or whole of the tax payable on such sales which would necessarily mean tax payable under the charging provisions of the Act. Thus, the Himachal Pradesh High Court had upheld the validity of Section 12-A on the ground

that "all the payments being made in respect of all works contract executed" means and refers only to the payments on account of valuable consideration payable for the transfer of property in goods and not other payments. The Himachal Pradesh High Court further held that Section 12-A did not enable any person to deduct any amount other than what was contemplated by the section and, therefore, it did not suffer from any invalidity. The Supreme Court while disapproving the above reasoning of the High Court held as follows :

> "A bare perusal of the two provisions will make it clear that in either provision there is an obligation to deduct from transactions relating to works contract on bills or invoices raised by the works contractor an amount not exceeding 4 per cent or 2 per cent, as the case may be. Though the object of the provision is to meet the tax in respect of the transactions on all works contract on the valuable consideration payable for the transfer of property in goods involved in the execution of the works contract, the effect of the provision is that, irrespective of whether the sales are inter-State sales or outside sales or export sales which are outside the purview of the State Act and those transactions in respect of which no tax can be levied even in terms of the enactment itself, such deductions have to be made in the bills or invoices of the contractors. To say that if a person is not liable for payment of tax inasmuch as on completion of the assessment refund can be obtained at a later stage is no solace, as noticed in *Bhawani Cotton Mills Ltd.* v.*State of Punjab* (1967) 20 STC 290 (SC) ; (1967) 3 SCR 577. Further, there is no provision for certification of the extent of the deduction that can be made by the authority. Therefore, we must hold that arbitrary and uncanalised powers have been conferred on the concerned person to deduct up to 4 per cent from the sum payable to the works contractor irrespective whether ultimately the transaction is liable for

payment to any sales tax at all. In that view of the matter, we have no hesitation in rejecting the contention advanced on behalf of the State."

(13) In this regard, the principles laid down by the Supreme Court in **Gannon Dunkerley and Co. Vs. State of Rajasthan** (supra) are apposite to be noticed. The Supreme Court while striking down the provisions of sub-Section (3) of Section 5 of the Rajasthan Sales Tax Act observed as under:

"The High Court has upheld the validity of sub-section (3) of section5 by taking into account the provisions of sub-rule (2) of rule 29. But, while considering the said provisions the High Court has failed to notice that under clause (i) of sub-rule (2) of rule 29, transfer of property in goods involved in the execution of a works contract, on which no tax is leviable under section 5, are not required to be deducted from the turnover. The High Court also failed to attach importance to the use of the word 'turnover' (instead of words 'taxable turnover') in sub-section (3 of section 5 as a result of which the amplitude of the incidence of tax has been widened so as to include transactions which are outside the sphere of taxation available to the State Legislature under entry 54 of the State List. *We are, therefore, unable to uphold the decision of the High Court in this regard and it must be held that sub-section (3) of section 5 transgresses the limits of the legislative power conferred on the State Legislature under entry 54 of the State List inasmuch as it enables tax being imposed on deemed sales resulting from transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract which take place in the course of inter- State trade or commerce, or which take place out side the State or which take place in the course of import and export within the meaning of sections 3, 4 and 5, respectively of the*

Central Sales Tax Act and it does not take into account the conditions and restrictions imposed by section 15 of the Central Sales Tax Act on goods declared to be of special importance in inter-State trade or commerce under section 14 of the Central Sales Tax Act. Clause (i) of sub-rule (2) of rule 29 of the Rajasthan Sales Tax Rules also suffers from the same infirmity. Section 5(3) of the Rajasthan Sales Tax Act and clause (i) of sub-rule (2) of rule 29 of the Rajasthan Sales Tax Rules must, therefore, be held to be unconstitutional and void".

(14) Thus, it is quite clear that in the light of the judgments of the Supreme Court in **Steel Authority of India Ltd. Vs. State of Orissa and others**[2] (supra), **Bhawani Cotton Mills Ltd. Vs. The State of Punjab and another**[3] (supra), **Nathpa Jhakri Jt. Venture Vs. State of Himachal Pradesh and others**[4] (supra), the constitutional validity of Section 35 cannot be upheld and it is liable to be struck down.

(15) We are of the considered opinion that the judgment of the High Court of Madhya Pradesh in the case of Punj **Lloyd Ltd. Vs. State of Madhya Pradesh and others**[1] (supra) is not a good law and *per incuriam* for more than one reason. In that case, while challenging the constitutional validity of Section 35 of the Adhiniyam what was urged has been noted by the Division Bench in para 6 of the judgment. It was contended on behalf of the petitioner that Section 35 of the Adhiniyam was beyond the competence of the State Legislature for the reason that the impugned provision is without guidelines and, therefore, it amounts to "*compulsory exaction of money under Articles 19 (1) (g), 301, 265, 366 (29 A) and 286 (3) of the Constitution of India" and "double taxation*". Of course, in para 7 of the judgment, the High Court of Madhya Pradesh has observed that the first and foremost question which the learned counsel

for the petitioner had submitted was that the provisions of the Act thereby meaning the provisions of Section 35 of the Adhiniyam are beyond the legislative competence of the State Legislature. The High Court of Madhya Pradesh has disposed of that contention by merely observing that *"Entry 54 of List II of the Seventh Schedule of the Constitution of India empowers the State Legislature to enact the laws on sales tax and, therefore, so far as the competence of the State Legislature is concerned, the State Legislature is competent to enact the Sales Tax Act which is beyond any dispute."* In the first place, the High Court of Madhya Pradesh has completely lost sight of the binding authority of the judgment of the Supreme Court in **Bhawani Cotton Mills Ltd. Vs. The State of Punjab and another**[3] (supra). Secondly, the High Court of Madhya Pradesh did not notice the fact that Section 35 of the Adhiniyam obliges the person letting out a works contract to deduct and deposit tax at the rate of 2% of such amount as he pays to the contractor regardless of the fact that the value of the works contract includes the value of inter-State sales, out side sales or sales in course of import. It is needless to state that a judgment rendered forgetting to take account of a previous binding decision of the Supreme Court and in ignorance of legislation of which the Court should have taken into account renders the judgment *per incuriam*.

(16) In Black's Law Dictionary (Eighth Edition) referring to the concept *per incuriam*, it is stated thus :

> "There is at least one exception to the rule of *stare decisis*. I refer to judgments rendered *per incuriam*. A judgment *per incuriam* is one which has been rendered inadvertently. Two examples come to mind: first, where the Judge has forgotten to take account of a previous decision to which the doctrine of *stare decisis* applies. For all the care

with which attorneys and Judges may comb the case law, *errare humanum est*, and sometimes a judgment which clarifies a point to be settled is somehow not indexed, and is forgotten. It is in cases such as these that a judgment rendered in contradiction to a previous judgment that should have been considered binding, and in ignorance of that judgment, with no mention of it must be deemed rendered *per incuriam*; thus, it has no authority....., The same applies to judgments rendered in ignorance of legislation of which they should have taken account. For a judgment to be deemed *per incuriam* that judgment must show that the legislation was not invoked. " Louis – Philippe Pigeon, *Drafting and interpreting Legislation* 60 (1988)."

"As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions of given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam*, must in our judgment, consistently with the *stare decisis* rule which is an essential part of our law, be of the rarest occurrence." (Rupert Cross & J.W. Haris, *Precedent in English Law* 149 (4th ed. 1991).

(17) In **Huddersfield Police Authority Vs. Watson**[8], Lord Goddard, CJ observed as under:

'What is meant by giving a decision per incuriam is giving a decision when a case or statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.'

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8. (1947) 2 All ER 193

(18) Evershed MR in **Morelle Ltd. Vs. Wakeling**[9] held as under:

> 'As a general rule the only cases in which decisions should be held to have been given per incuriam are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decisions or some step in the reasoning on which it is based is found, on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be .... of the rarest occurrence. '

(19) The Supreme Court in **Municipal Corporation of Delhi Vs. Gurnam Kaur**[10] has held that a decision should be treated as given *per incuriam* when it is given in ignorance in terms of a statute, or of a rule having the force of a statute. In view of the judgments of the Supreme Court in **Punjab Land Development & Reclamation Corporation Ltd. Vs. Presiding Officer, Labour Court**[11], **Commissioner for Hindu Religious and Endowments Vs. C. Lakshminarasinhaiah**[12], **Union of India Vs. Indian Railways SAS Staff Axssociation**[13], and **A.R. Antulay Vs. R.S. Nayak**[14], the expression '*per incuriam*' means decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority finding on the Court concerned. A decision can be said generally to be given *per incuriam* when a High Court has acted in ignorance of a decision of the Supreme Court on a point.

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9. (1955) 1 All ER 708
10. AIR 1989 SC 38
11. (1990) 3 SCC 682
12. (1990) Supp. SCC 164
13. (1995) Supp (3) SCC 600
14. (1988) 2 SCC 602

(20) For the reasons aforementioned, we hold that the judgment of the High Court of Madhya Pradesh in the case of **Punj Lloyd Ltd. Vs. State of Madhya Pradesh and others**[1] (supra) is a judgment *per incuriam*. A court decision as to the legal meaning of an enactment which is arrived at *per incuriam* is not a binding precedent, and therefore does not amount to dynamic processing of the enactment. As held in **Rickards v. Rickards**[15] and **Wellcome Trust Ltd. v. Hamad**[16], a court gives a decision *per incuriam* 'not only where that decision is given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on it, but also where the decision involves a manifest slip or error.'

(21) The other reason given by the High Court of Madhya Pradesh to uphold the constitutional validity of Section 35 of Adhiniyam, as could be seen from paras 8 and 10 of the judgment, is that Section 35 is only a machinery provision and *"it is not a taxing event"* nor a "*charging section*". There is no need for us to dilate on the point whether the above observation made by the High Court of Madhya Pradesh is acceptable to us or not. Suffice it to state that even assuming that Section 35 is only a machinery provision, it has an inevitable nexus with the charging provision. If the charging provision cannot be sustained, the machinery provision can also be not sustained. In other words, if the State does not have power to impose tax on the sale of goods which does not fall within the realm of its legislative competence, any provision regarding recovery of such tax on such sale of goods cannot be within the legislative competence and has to be declared *ultra vires.* In taking this opinion, we are fortified by the judgments of the Patna High Court in **Larsen & Tourbo**

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15. (1990) Fam 194
16. (1998) QB 638

Vs. State of Bihar[17] and **National Building construction Corporation Ltd. Vs. State of Bihar and others**[18].

(22) The Gujarat High Court in the case of **Larsen & Tourbo Ltd. Vs. Commissioner of Sales Tax, Gujarat**[19] relying on the judgment of the Supreme Court in **Steel Authority of India Ltd. Vs. State of Orissa and others**[2] (Supra), held that the provision requiring deduction of advance tax from all payments to contractors in the absence of certificate from the Commissioner that no tax is deductible was *ultra vires*, since such a provision did not take into account the fact that the State Legislature has no power to impose tax on inter-State sales or sales in the course of import or outside sales. Thus, it is quite clear that any provision intended to collect advance tax can be sustained only if the State is competent to impose tax on such items. Looking from any angle, the Constitutional validity of the impugned provision cannot be upheld.

(23) In the result and for the foregoing reasons, we allow this writ petition. Section 35 of the Chhattisgarh Vanijyik Kar Adhiniyam, 1994 is struck down as being beyond the purview of the State Legislature. The amount collected from the petitioner under the provisions of Section 35 of the Adhiniyam, if any, shall forthwith be refunded by the State to the petitioner. In the facts and circumstances of the case, the parties shall bear their respective costs in this writ petition.

Sd/-
Chief Justice

Sd/-
Dilip Raosaheb Deshmukh
Judge

17. (2000) 117 STC 41 18. (2000) 118 S
19. (2001) 124 STC 162